

INCOMMENSURABILITY, WELFARE ECONOMICS, AND THE LAW

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In the philosophical literature on values and practical reason, a debate has arisen over the thesis that certain goods or values are incommensurable.¹ This raises an obvious question for legal scholars: Would this thesis, if true, have implications for the law? Several authors have claimed that it would, by challenging various economic justifications for legal decisions.²

One purpose of this Article is to argue against that claim. To make this argument, though, a good deal of clarifying work is required. Economic arguments can be criticized on many different grounds, but each criticism rests on a slightly different footing, and many have little to do with incommensurability. Thus, a second purpose of this Article—and perhaps the more important one—is to try to clarify the various arguments.

The need for clarification stems partly from the differing aims of philosophers and economists. Some of the philosophical writings on

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¹ See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); S.L. HURLEY, *NATURAL REASONS: PERSONALITY AND POLITY* (1989); MARTHA C. NUSSBAUM, *Plato on Commensurability and Desire*, in *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 106 (1990); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 321-66 (1986); HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* (1997). For a useful survey, see Ruth Chang, *Introduction*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1* (Ruth Chang ed., 1997).

² See, e.g., ANDERSON, *supra* note 1, at 141-216; Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199-203 (1997); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705, 1733 (1995).

incommensurability aim to develop a descriptive account of individual choice, arguing (in particular) that choices are not adequately described as if the individual picked whichever option ranked highest in some single value. Much of this literature also aims to develop a theory of practical reason or rational action—that is, a theory of how individual choices ought to be made—arguing that individuals *should not* pick whichever option ranks highest in some single value. But both of these aims concern individual choice: neither directly addresses questions about how government decisions ought to be made. And on the other side of the divide, welfare economists—who do purport to be addressing government decisions—have not always been very clear what they assume regarding individual choice. As a result, in many discussions of incommensurability and law, the participants end up talking past one another, and the issues are never truly joined.

My interest in this Article concerns the proper bases for government decisions, or for the law. Thus, for most of the Article I assume that the theories of incommensurability are correct, as far as individual decisions are concerned, in order to trace out the possible implications for government. Part I of the Article explains more precisely what I mean by incommensurability, and Part II clarifies what I take to be the presuppositions of welfare economics. The bulk of my argument, however, appears in two main substantive sections.

Part III begins by asking what would follow from the incommensurability of values in an admittedly unrealistic scenario, in which only a single individual would be affected by some government decision. Few legal decisions fit this extreme assumption, but in untangling the possible consequences of incommensurability, I find it a useful heuristic to consider which consequences might apply even in so extreme a case. Part IV then turns to the more realistic case of a decision that affects different individuals in different ways. In such a case, mainstream welfare economics already recognizes one form of incommensurability involving interpersonal comparisons of utility, but this has not been the focus of the philosophical writings on the incommensurability of goods or values. Thus, most of Part IV considers methods of interpersonal comparison that are sometimes used by economists, such as the Kaldor-Hicks criterion, and the possible alternatives that might be required by various theories of incommensurability. I conclude that most of these alternatives are either unsound or have not yet been developed to the point where we can judge their soundness.

I. SOME DEFINITIONS

A. *Incommensurability*

As many have noted, there is no standard definition of "incommensurability."³ For purposes of this Article, I take the claim that two options are incommensurable as a claim about the possible *justifications* for choosing one option over the other. More precisely, I take incommensurability to mean that there is no scale or metric that (1) would satisfy the property of completeness, meaning that one of the options must rank higher on the scale or they must both rank exactly equal; and (2) would justify the choice of whichever option ranked higher.

I focus on justifications for decisions because this is when incommensurability becomes important for the law (as well as for welfare economics). It is one thing to ask, in the abstract, whether a beautiful mountain gorge can meaningfully be valued on the same scale that we use to value cheaper electricity. But this question has the most bite when the law for some reason must choose between these values—for example, if there is a proposal to build a dam that would flood the gorge. Welfare economics purports to offer a basis for evaluating that decision and for justifying one choice rather than the other. My interest in incommensurability, therefore, is in the extent to which it undermines this justification.⁴

My focus on justifications will force me to consider ethical or political questions about what counts as a legitimate justification for government action. But any discussion of incommensurability must implicitly raise such questions, for any two goods can always be ranked on *some* scale. That is, the mountain gorge and cheaper electricity can clearly be ranked on arbitrary scales such as alphabetical order or, to use Ruth Chang's example, "pleasingness to my grandmother."⁵ In my terms, though, a claim that two options are incommensurable must be a claim that they are incommensurable *for some*

³ See, e.g., Chang, *supra* note 1, at 1-2. The definition I use here is close to that which Chang (and others) refers to as "incomparability," but my definition includes cases that Chang would describe as lacking any "covering value" with respect to which comparability could be assessed. *Id.* at 8. A similar definition is used by RICHARDSON, *supra* note 1, at 104-05.

⁴ Because my focus is on justification, I have little to say about the purely predictive uses of economics, except for a brief discussion *infra* at Part II.B. I therefore do not address many of the criticisms raised by Nussbaum, *supra* note 2, or Warner, *supra* note 2.

⁵ Chang, *supra* note 1, at 6.

particular purpose: it is a claim that some particular decision cannot be justified by ranking the options along any single metric.⁶ Thus, the reason arbitrary scales cannot supply commensurability is because they are irrelevant to any decision about building the dam. Whether the criteria of welfare economics are similarly irrelevant will be taken up below.

Notice, too, that the problem with arbitrary scales is not simply that they provide an inaccurate description of the goods involved, or that their description is inadequate or incomplete.⁷ After all, every description will be incomplete in some respect, so the completeness or adequacy of a description can only really be judged by reference to the purpose for which the description will be used. In this Article, I am interested in the purpose of justifying government decisions, so I view descriptive inadequacy as a problem when (but only to the extent that) it undermines some justification for a government decision. To see whether any particular inadequacy is a problem, the justification that is purportedly undermined by it will have to be spelled out explicitly.

B. Commodification

My definition of incommensurability is meant to distinguish it from the related issue of commodification. I take commodification to be a concern over one possible effect of describing or justifying choices as if they were commensurable—and, also, one possible effect of adopting certain legal rules, such as allowing babies to be sold for money. Specifically, the concern is that justifying choices in this way (or permitting people to take certain actions) could alter the way that people view the goods themselves, and this effect could be undesirable. For example, if babies regularly are bought and sold, this could lead people to think of babies as nothing more than financial assets. Or if hydroelectric dams are justified using the criteria of welfare

⁶ Chang makes a similar point when she notes that incommensurability (or in her terms, “incomparability”) can be assessed only with respect to some “covering value.” *Id.* at 7.

⁷ Cass Sunstein defines incommensurability so as to treat two goods as incommensurable if the only metrics along which they could be ranked would not fully reflect “our considered judgments about how these goods are best characterized.” Sunstein, *supra* note 2, at 796 (emphasis omitted); see also Pildes & Anderson, *supra* note 2, at 2176 n.136 (“All attempts to represent people’s values in terms of preference rankings alone, however, leave out much of importance. . . . [A] full understanding and assessment of people’s values requires knowledge of the reasons behind their rankings and of the way in which people interpret the significance of the outcomes ranked.”).

economics, this could cause people to lose their reverence for nature.⁸

In this Article, I do not address criticisms of welfare economics that are based on commodification. These criticisms raise empirical questions about cognitive and social psychology, and while these are clearly topics of importance, they are also topics on which I have little to say.⁹ Moreover, the answer to these empirical questions need not depend in any way on the normative question that is my focus here—that is, whether welfare economics provides a metric or scale that is an acceptable justification for public decisions. After all, even if welfare economics supplies a normatively acceptable justification, its use might still produce undesirable psychological consequences (which could then provide a different reason for objecting to its use). Conversely, even if welfare economics does not supply a normatively acceptable justification, this does not establish that its use also would produce undesirable psychological consequences. In short, there are some issues of justification that are logically independent from the question of psychological consequences, and these independent justificatory issues will be my focus here.

II. THE PRESUPPOSITIONS OF WELFARE ECONOMICS

As noted earlier, most of the philosophical literature on incommensurability has focused on individual choice. For example, if the individual must choose between a career as a lawyer and a career as a philosopher, a claim that these two options are incommensurable is a claim that there is no single scale that would both: (1) rank the career as a lawyer either higher or lower than the career as a philosopher; and (2) count as an acceptable normative reason for choosing the higher-ranking career.

It is important to note that, according to most accounts of incommensurability, the lack of such a scale would not prevent the in-

⁸ For useful discussions of commodification generally, see MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996), and Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). Sunstein links commodification to incommensurability when he speaks of the fear that “a single metric, nominally descriptive of experience, would actually transform it, in a way that would make a great deal of difference.” Sunstein, *supra* note 2, at 797. As this example suggests, concerns about incommensurability are often intermingled with concerns about commodification.

⁹ I do, however, touch on these issues briefly in Part III.E.

dividual herself from choosing between the two options.¹⁰ That is, few if any writers argue that an individual faced with a choice between incommensurable options is therefore paralyzed, unable to make any decision at all (like Buridan's ass). Instead, the incommensurabilist's claim is a claim about the possible *justifications* for whatever choice the individual eventually makes. Specifically, it is the negative claim that the justification for that choice cannot be found in any scale that ranks one career higher than the other.

A. *Individual Utility Functions*

We must now consider what implications this claim would have for welfare economics. My thesis here—and I do not believe this to be controversial—is that welfare economics is entirely consistent with this concept of incommensurability. That is, welfare economics (properly understood) does not presuppose anything about the possible justifications for an individual's choice.

This claim may seem implausible to those who equate welfare economics with some form of utilitarianism. After all, welfare economics does speak of individuals' utility functions, as if every option the individual might choose could be assigned some measure of utility. In welfare economics, however—unlike in classical utilitarianism—a higher ranking in some measure of utility is not what *justifies* the individual's choice. Instead, the higher ranking in utility is simply a mathematically convenient way of *describing* the individual's choice. That is, when a welfare economist says that option *x* gives the individual more utility than option *y*, this is best understood as simply asserting that, if the individual were faced with a choice between those two options, she would—for some as yet unspecified reason—choose *x*. As Bengt Hansson has put it, “[o]n this view, utilities can never form a *reason* why someone makes a choice, but are rather to be construed as a way of *describing* a set of given choices.”¹¹ And since commensurability (as I define it) is present only if there is some scale capable of justifying a choice between the options, utility functions of this sort are perfectly consistent with the absence of commensurability. That is, a

¹⁰ This is clearly true of ANDERSON, *supra* note 1, at 59-64, and Sunstein, *supra* note 2, at 810-12. For a survey of other authors, see Chang, *supra* note 1, at 11-13 & 258 nn. 21-23.

¹¹ Bengt Hansson, *The Decision Game—The Conceptualisation of Risk and Utility*, in ETHICS: FOUNDATIONS, PROBLEMS, AND APPLICATIONS 187, 188 (Edgar Morscher & Rudolf Stranzinger eds., 1981), *quoted in* RICHARDSON, *supra* note 1, at 95.

utility function is entirely consistent with the possibility that there is no single scale or ranking that would *justify* the choice described by the function.¹²

Another way to see this is to note that the utility functions used by welfare economics do not place any restrictions on the individual's reasons for choosing one option over another. Even on so simple a matter as choosing ice cream, the individual may have to weigh or balance many different kinds of conflicting values (taste, calories, social appropriateness, and so on).¹³ To be sure, utility theory does place some restrictions on the choices themselves—transitivity, completeness, and the independence of irrelevant alternatives—but it does not place any restriction on the reasons an individual might have for making an otherwise permissible choice. Thus, welfare economics does not require that the choices that are reflected in utility functions be based only on “wants and not ethical concerns,”¹⁴ or that the choices must take “exclusively appropriated goods as their basic object,”¹⁵ or that individuals must adopt “an egoistic, commodity fetishist orientation to their choices.”¹⁶ Nor does it assume that individuals' goals “are hard-wired by exogenously given tastes,”¹⁷ or that goals “cannot themselves be the subject of rational deliberation.”¹⁸ Nor does it imply that the result, from the individual's perspective, is “a flat uniform landscape of value, with no jagged promontories or deep valleys,” and with “few motivations for moving here rather than there on that landscape.”¹⁹

Of course, if the utility functions used by welfare economics do not presuppose anything about an individual's reasons for choosing one option over another, they also cannot convey any information

¹² This point has been made by any number of authors, including ANDERSON, *supra* note 1, at 72; HURLEY, *supra* note 1, at 59; RICHARDSON, *supra* note 1, at 95-103; and Jean Hampton, *The Failure of Expected Utility Theory as a Theory of Reason*, 10 ECON. & PHIL. 195, 207-10 (1994).

¹³ For attempts to model these different dimensions formally, see, for example, Kelvin J. Lancaster, *A New Approach to Consumer Theory*, 74 J. POL. ECON. 132 (1966), and George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977).

¹⁴ ANDERSON, *supra* note 1, at 200.

¹⁵ *Id.* at 166.

¹⁶ *Id.* at 199; see also *id.* at 145 (“Every extension of the market thus represents an extension of the domain of egoism, where each party defines and satisfies her interests independent of the other.”).

¹⁷ Nussbaum, *supra* note 2, at 1207.

¹⁸ *Id.* at 1197-98.

¹⁹ NUSSBAUM, *supra* note 1, at 117.

about those reasons. Instead, the utility functions simply report the outcome or result of whatever choice the individual would make, without trying to report anything about the reasons that might justify that outcome. Indeed, for most purposes of welfare economics, the "utility function" could be replaced by a "choice function" that made no reference to utilities, or by a simple ordinal listing of the options in the order in which the individual herself would choose them.²⁰ The question of whether a mere ordinal listing could ever suffice to justify a government decision will be taken up in Part III.

B. *Predictive Uses of Economics*

First, however, something must be said about the rather different presuppositions made by economics when it attempts to *predict* individual choices. Obviously, the utility functions just described are useless in predicting choices. Since these functions are just a convenient way of describing or reporting whatever choices the individual would actually make, any information about the likely content of those choices must come from some other source. Indeed, this need for information from some other source may be why some philosophers have assumed that economics *must* place more restrictions on the content of utility functions.²¹

Not surprisingly, then, the positive branches of microeconomics—as distinct from the normative branch that is welfare economics—often do place restrictions on the content of utility functions, precisely in order to make predictions. Some of these restrictions are not very controversial—for example, it usually is assumed that individuals prefer to pay a lower price rather than to pay a higher one (for the same good), or that they prefer more of a good rather than less (if it truly is a "good"). But even these restrictions usually require further information before they can be made operational—for example, is elevator music a "good" that people prefer, or is it an unwanted externality? And when more specific predictions are needed, the positive branches of economics routinely draw on sources other than formal utility theory. For example, to predict the equilibrium price of ice cream an economist must be able to estimate both the demand and supply curves, which requires information about consumers' tastes and spending habits (to estimate the demand curve) and about

²⁰ For this reason, I will use "utility function" and "choice function" (or "choice ordering") interchangeably throughout the remainder of this Article.

²¹ See *supra* text accompanying notes 14-19.

manufacturers' costs (to estimate the supply). This sort of information must come from cost engineers and marketing researchers: it clearly cannot come from utility theory itself.

Of course, similar predictions are often needed to evaluate government decisions. For example, if the government is deciding whether to build a new transit system, a number of predictions will be required (for example, how many people will give up their cars and use the new system?) simply to identify the likely effects of the decision. To make these sorts of predictions, analysts must rely on the best information they have about how individuals choose (making due allowances, of course, for the cost of gathering better information), so they cannot afford to disregard any available information about the reasons behind individual choices. If any economist is instead making predictions on the basis of an overly thin conception of what motivates choice, skepticism about the accuracy of those predictions is entirely justified.²²

By contrast, though, the task of welfare economics begins only after these predictions have been made: only after the relevant choices have all been predicted. After all, even when we have predicted which citizens will use the transit system, and which citizens will be able to find better jobs in areas served by the new system, and which citizens will pay more in taxes—even after we predict all of these effects, the totality of effects must somehow be evaluated in order to come to a normative conclusion about the project. Thus, even if the reasons for individual choices (and not the bare fact of the choices themselves) must be considered in order to make *good predictions*, there is still a separate question about whether the reasons for individual choices must be considered in order to reach *good normative conclusions*. This is the question I address in Part III.

1. Revealed Preferences

Before reaching that question, however, one other source of confusion must be addressed concerning the use of revealed preferences. As we have seen, we cannot predict individuals' choices until the content of their utility rankings has been filled out with information from

²² This is probably the best reading of many (though not all) of the criticisms in Nussbaum, *supra* note 2. See also, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1024-25 (1995) (criticizing what he sees as the unduly narrow basis for predictions in TOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* (1993)).

some other source. But economists have sometimes claimed—or their critics have sometimes read them as claiming—that in many cases, the only information that is either useful or required is information about the individual's *behavior*. The claim is that if we observe that an individual has chosen option x over option y , this tells us that x must rank higher in that individual's utility function, without the need for any further information about why she chose x .²³

The problem with this approach arises when we try to define the variables x and y to generate a useful prediction. To illustrate, the fact that an individual chose to eat ice cream on a hot day in August, when it had been several hours since she last ate, and when three friends were eating ice cream with her, cannot in and of itself tell us anything about what that individual would choose under other circumstances.²⁴ Almost surely, she will be less likely to choose an ice cream cone if it is a cold day in January, or if she has just finished six other desserts. She may also be less likely to choose an ice cream cone if she is by herself, or if her friends are all on diets and have given up ice cream. Conceivably, she might even be less likely to choose ice cream if the date is a prime number, or if the Liberal party is in control of the New Zealand Parliament. Of course, it would be unusual (to say the least) if these last two factors made any difference—but they cannot be ruled out simply by observing what she chooses on any single, non-prime-numbered date when the Liberal party is not in power on the other side of the globe. Instead, to the extent we feel confident in ruling out such bizarre factors (while confidently predicting that local temperature would be relevant), this has to be because of other sources of knowledge about the kinds of things

²³ See, e.g., Sunstein, *supra* note 2, at 794 n.48 ("On this view, we do not hypothesize any supervalue such as utility, but work instead with a rank ordering of individual preferences, based on actual choices (revealed preferences).") (emphasis added)).

There is some potential for confusion here, since the utility functions used in welfare economics can always be expressed as mere rank orderings, without the need for any supervalue such as utility. What is distinctive about the "revealed preferences" approach is that it estimates that ordering by looking only to information about an individual's actual behavior. In this otherwise thorough article on incommensurability, Sunstein did not consider any other method of estimating individuals' rankings. A better treatment can be found in the more recent article by Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 76-83 (1995) (criticizing the use of revealed preferences, but recognizing that there are other ways—each with its own potential problems—of trying to estimate the choices that citizens would make).

²⁴ A useful discussion of this point can be found in Amartya Sen, *Internal Consistency of Choice*, 61 ECONOMETRICA 495 (1993).

that our fellow citizens prefer. Predictions based on this sort of knowledge may be more or less accurate, but they always will be merely predictions, so there always will be some risk of error.

For much the same reason, it normally will not be possible to estimate an individual's complete utility rankings by asking her about every choice she could conceivably face. As economists are quick to point out, an individual's answers to hypothetical questions will not necessarily be reliable (though this does not prove that they will be any less reliable than the extrapolations that would have to be made in their absence). But even if all problems of reliability could be solved, hypothetical questions still cannot eliminate the need for extrapolations, for every option can vary in an infinite number of ways (ice cream at 3:56 in the afternoon, ice cream at 3:57, etc.), and there is no way to ask about every possible variation. There is also no reason to assume that every choice will remain constant over time, so by the time we got done asking about every possible choice, we would have to start over in case some of the answers had changed. Thus, whether we look to actual choices or to answers to hypothetical questions (or both), any attempt to estimate a utility function will have to be based on extrapolations from a comparatively small set of data. We therefore will require some other source of information to figure out what changes in context are most likely to make a difference.

2. Cost-Benefit Analysis

Once this is understood, many criticisms of cost-benefit analysis can also be seen as objections to the accuracy of predictions about individual choice. For example, Cass Sunstein has criticized cost-benefit analyses for trying "to measure diverse social goods along the same metric," citing as examples studies that attempt to measure the dollar value of each life saved by various safety regulations.²⁵ Phrased in this way, the criticism seems to derive from a claim about incommensurability, or a claim that lives simply cannot be measured on the same scale as dollars. However, the core of Sunstein's criticism is actually rather different.

Like most incommensurabilists, Sunstein does not believe that an individual would be unable to choose between any particular risk of death, on the one hand, and any particular quantity of dollars, on the other.²⁶ That is, even if risks and dollars are incommensurable for

²⁵ Sunstein, *supra* note 2, at 841-43.

²⁶ See *id.* at 810-12.

purposes of *justifying* the individual's choice, the individual should still be able to choose one or the other in any particular context. And as long as the individual could make such a choice, we can always construct a utility function in which that particular risk ranks either higher or lower than that particular quantity of dollars. Thus, the fact that risks and dollars are "diverse goods" is not inconsistent with a single ranking that simply reports or describes whatever choice the individual would actually make.

Of course, Sunstein could believe that such a ranking would be irrelevant for purposes of *justifying* government decisions: This is the question to be addressed in the body of this Article. But Sunstein also makes a different argument that speaks entirely to the accuracy of *predicting* the choice an individual might make in one context based on observations of her actual choices in another. That is, just because an individual would choose a one-percent risk of death from cancer over a \$300 reduction in wages, it does not follow that she would also choose a ten-percent risk of being mangled in a car accident over a \$3000 increase in the price of cars (or a \$3000 increase in taxes). As Sunstein says:

When a worker accepts a risky job for cash, it may mischaracterize his choice to say that he "really" thinks that the risk is equivalent to that amount of cash—if the word "really" is intended to capture an abstract, *acontextual judgment*. Instead he has simply taken this job in preference to others among a specific range of opportunities, and this decision, in its context, means nothing more general.²⁷

Notice, though, that the source of inaccuracy or crudeness here has nothing to do with the philosophical literature on incommensurability, or with the claim that "goods are diverse and valued in different ways."²⁸ After all, the same danger of inaccuracy would be present even if we were evaluating purely financial risks, where we would still

²⁷ *Id.* at 838 (emphasis added). Many of Elizabeth Anderson's objections to cost-benefit analysis (though perhaps not all of them) also reduce to this criticism. See, e.g., ANDERSON, *supra* note 1, at 215 (arguing that an individual's rankings are always context dependent); Pildes & Anderson, *supra* note 2, at 2151-52 (same). The same appears to be true of one argument made in Nussbaum, *supra* note 2, at 1202 (arguing that qualitatively distinct ends make all choices contingent upon context).

²⁸ Sunstein, *supra* note 2, at 843; see also Pildes & Sunstein, *supra* note 23, at 64 (criticizing traditional cost-benefit analysis for being "obtuse—in the sense of insufficiently fine grained—insofar as it *tries to measure diverse social goods along the same metric*" (emphasis added)); Sunstein, *supra* note 2, at 787 ("*Because of the existence of diverse kinds of valuation*, we may not be able to generalize *acontextual preferences* from particular decisions." (emphasis added)).

have to be cautious about extrapolating from the choices made by some individuals in some contexts to the choices made by other individuals in other contexts.²⁹ In other words, the only sense in which these goods are "diverse" is that they are being chosen by different individuals and in different contexts: it is the sense in which ice cream in August is "diverse" from ice cream in January. While these diversities of course ought to be taken into account in any cost-benefit analysis, they have nothing to do with incommensurability in the sense of the philosophical literature.³⁰

To focus the issue more precisely, suppose that we have predicted the choice that an individual would make between the actual risks at issue—and suppose that we are confident in the accuracy of this prediction, perhaps because of our close knowledge of the individual in question. If we are confident in the accuracy of our prediction, this means that we have already taken into account all the relevant differences between the actual risks at issue and any other choices we may have observed, at least insofar as those differences are relevant to predicting what this individual herself would choose. Thus, we will have already considered whether this individual might feel differently about death from cancer than she does about death in an auto accident, or about risks she assumes voluntarily versus risks that are imposed on her. As I have stressed all along, in order to make accurate *predictions* about individual choices, this sort of additional information is essential.

Suppose, however, that we now report the choice that we have predicted in the form of a bare-bones, ordinal ranking (or utility function) that eliminates all information about the reasons for her choice. This ranking clearly creates a kind of formal commensurability, since it locates the two options along a one-dimensional scale. However, this ranking achieves formal commensurability only by sup-

²⁹ As finance theorists have recognized, financial investments may themselves vary across more than one dimension—for example, one may have a higher expected return while the other has a smaller variance in the range of possible returns. Similarly, individual investors may differ from one another in their attitude toward risk (and, hence, in their willingness to trade a higher expected return against a smaller variance). Nevertheless, these differences should not prevent any given individual from being able to commensurate any two particular financial investments. For a concise survey of the technical finance literature on this point, see JONATHAN E. INGERSOLL, JR., *THEORY OF FINANCIAL DECISION MAKING* 95-97, 114-24 (1987).

³⁰ See Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1551 (1996) (recognizing that to urge the disaggregation of diverse health risks, rather than valuing them all in terms of the same value per unit of risk, "is not to say that there is a problem of incomparability").

pressing potentially relevant information about the reasons for the individual's choice. The key question, then, is whether this ranking (without the omitted information) can justify a government decision. If it cannot, then the fact that the options can be ranked in this way has no more significance than the fact that they can be ranked in alphabetical order or by their pleasingness to Ruth Chang's grandmother. But if, instead, this ranking *can* provide a justification for government decisions, that would make the two options commensurable in the critical sense that I defined in Part I: it would show that the options can be ranked along a single scale that can justify a government decision. To decide whether these options are commensurable, then, we have to address the question of how government decisions should be justified.

III. DECISIONS AFFECTING A SINGLE INDIVIDUAL

I begin by stacking the deck in favor of the justificatory relevance of utility functions by assuming that the government must (for some reason) make a decision that would affect only a single individual. This is obviously an unrealistic assumption, partly because social interdependencies make such isolated effects unlikely, and partly because if there ever were such a case, the decision normally would be left to the individual herself rather than being assigned to the government.³¹ Still, governments sometimes *do* make decisions that might be better left to individuals. And welfare economists can still advise the government in such a case, even if they privately feel that the government should not be making the decision at all, just as they could advise government planners in a socialist economy.

I should emphasize that my focus here is on which decision the government ought to make—for example, should it choose to make her submit to certain risks or instead give her less money?—and not on the (arguably prior) question of whether the decision ought to be made by the government at all. This might appear to be an odd focus, since much of the prior literature seems driven by the arguably prior question: by concerns about which decisions should be made by the government and which should be left to the market.³² But if

³¹ The more realistic case in which the government's decision would affect different individuals differently will be considered in Part IV.

³² This is particularly true of ANDERSON, *supra* note 1, at 141-89; and of nearly all of the literature on commodification, such as RADIN, *supra* note 8. On the other side of the ideological spectrum, this question is also the principal focus of Richard A.

two options are truly incommensurable, the impact on the government should be greatest when the government itself is the institution that must, for some reason, make the choice between the incommensurable options. Thus, the easiest way to see whether incommensurability undermines economic justifications for government decisions is to focus on situations where the government itself must choose.

In any event, in this Part, I assume that only a single individual would be affected by the government's choice. I also assume that the options from which the government must choose are incommensurable for purposes of the individual's decision, in the sense that there is no single ranking of those options that would *justify* the individual's choice of one rather than the other. However, I also assume that if the choice had been left to the individual, she would somehow be able to choose one option over the other: She would not be paralyzed with indecision. And I also assume that we can predict the choice she would make with an acceptable degree of accuracy so that we can rank the options ordinally to reflect what she herself would choose. The question, then, is whether this ordinal ranking can justify the government's choice of whichever option ranks higher.

A. *The Relevance of Individual Utility Functions*

At this point, there is an obvious argument that the government would be justified in choosing whichever option ranks higher in the individual's own choice ordering. After all, if the only affected individual would choose some amount of dollars rather than a reduction in a particular risk—or, of course, if she would instead choose the reduction in risk rather than the dollars—why should the government not give her what she herself would choose? In any liberal society, the fact that the only affected individual would choose x over y will usually have at least some normative relevance in justifying the government's own choice of x .

Of course, there are many possible objections to this argument, some of which will be considered below. For now, the important point is that the ranking used in this argument is one that reports the bare fact of the individual's choice without conveying any information about her reasons for the choice. In effect, this argument says that the government ought to respect the choice that the individual herself would make—or, more precisely, our best prediction about the

choice she would make—*without regard* to the soundness of her reasons for making that choice. This argument thus represents a specific interpretation of the idea that the government ought to be neutral toward different individuals' conceptions of the good life. As John Harsanyi has put it, "in deciding what is good and bad for a given individual, the ultimate criterion can only be his own wants and his own preferences."³³

I mention this because it is sometimes asserted that if utility theory places no restrictions at all on the reasons for an individual's choice, the result is nothing more than a tautology.³⁴ But this assertion must be handled with care, for the reduction to a tautology (or not) depends on the purpose for which utility theory is being used. If it is used in an attempt to *predict* an individual's choice—that is, to claim that an individual usually does choose whichever option ranks highest on her utility function—then we do indeed have a tautology. As Part II explained, the utility functions used in welfare economics merely report whatever choice an individual would make, so this sort of prediction says (tautologically) that "individuals will choose whatever they in fact will choose." We also have a tautology—or, at least, an unhelpful statement—if utility theory is used in an attempt to *justify* an individual's choices, for it is equally vacuous to say that "an individual ought to choose whatever she in fact would choose."³⁵

If utility theory is being used to justify *government* decisions, however, there is no tautology at all in recommending that "a government ought to choose whatever the only affected individual would choose." Thomas Scanlon has correctly characterized this argument as resting on

the moral claim that when we must decide what is good or bad for others, for the purposes, for example, of making decisions about the use of public resources, we should take those people's wants and preferences

³³ John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in UTILITARIANISM AND BEYOND 39, 55 (Amartya Sen & Bernard Williams eds., 1982).

³⁴ See, e.g., AMARTYA SEN, ON ETHICS AND ECONOMICS 40 n.13 (1987) ("[S]ome defenders of utility-based calculation seem to have been tempted to redefine the term 'utility' to cover whatever it is that we wish to value. As a defense of utility-based ethical calculation this is tautologous and adds little to the discussion.").

³⁵ James Griffin has attempted, by putting more restrictions on the individual's choice (requiring the choice to be made in a calm frame of mind, etc.) to construct an argument capable of *justifying* the result of such a choice. See JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 21-39, 75-92 (1986). I take no position on whether his argument is successful, and my argument in this Article does not depend on the success of his.

as our ultimate standard *even though these are not what makes things good*....³⁶

This moral claim can, of course, be disputed on its merits—but it cannot be dismissed as a mere tautology.

B. *Objections Unrelated to Incommensurability*

Now to the merits of the issue. While there are many reasons why it might not be justified for a government to follow the choice that the individual herself would make, some of those reasons have nothing to do with incommensurability. Indeed, some of these reasons have been embraced by economists, and are not even controversial. For example, if an individual would choose x over y when coerced at the point of a gun, few would say that the government would therefore be justified in choosing x over y . In other words, the normatively relevant utility function is not one that reports the choices the individual would make at gunpoint. But this objection applies to any choice, and to any x and y , without regard to whether x and y are incommensurable.

The same is true of objections based on imperfect information. Economists sometimes recommend that the government not follow whatever choice an individual would actually make, but rather the choice she would have made if she had been perfectly informed.³⁷ There are, of course, some obvious and not-so-obvious difficulties in defining what it means to be “perfectly” informed.³⁸ But whatever one thinks of these difficulties (and of their possible resolutions), they apply with equal force whether or not there is any incommensurability involved. For example, the information problem (and its possible resolutions) would be exactly the same if an individual were misin-

³⁶ Thomas M. Scanlon, *The Moral Basis of Interpersonal Comparisons*, in INTERPERSONAL COMPARISONS OF WELL-BEING 17, 26 (Jon Elster & John E. Roemer eds., 1991) (emphasis added); see also *id.* at 24 (referring to this claim as “at base a moral doctrine,” as distinct from an “account of the nature of value”).

³⁷ The full economic analysis is actually more complex, for if the government simply makes a different choice for the individual without correcting her misinformation, she may go on to make other errors (for example, not using a product in the proper way, or not buying insurance against risks she is unaware of). For a formal model of these “second-best” problems, see Samuel A. Rea, Jr., *Workmen's Compensation and Occupational Safety Under Imperfect Information*, 71 AM. ECON. REV. 80 (1981).

³⁸ For more detailed discussions of these information problems, see ANDERSON, *supra* note 1, at 138-40; GRIFFIN, *supra* note 35, at 11-14; and Scanlon, *supra* note 36, at 28-30.

formed about the merits of two commensurable financial investments.

Though it may be less obvious, the same is true of objections to individual choices that are forced by hard circumstances. For example, it is sometimes said that there is no reason for the government to follow someone's decision to accept a dangerous job, or a career as a prostitute, if that choice was forced on her because her only alternative was to starve.³⁹ This objection is more dubious on its merits because, as long as starvation is really the only alternative, it is hard to see why the government ought to reject the choice the individual herself would make and instead require her to accept the only alternative of starvation.⁴⁰ (If the plan is to introduce some third option, such as a better welfare program or better employment opportunities,⁴¹ the individual herself presumably would choose that over either of the first two options, so her own utility function could still be followed.) Still, even if we ignore this problem and accept the argument for disregarding choices forced by hard circumstances, it remains true that this argument has nothing to do with incommensurability as such. That is, if the bleakness of the alternative is what justifies our disregarding the individual's own choice, that should justify our disregard even if the forced choice involved a mere financial investment.

For the remainder of the Article, then, I will set these issues aside by assuming that we can predict the choice that the individual would make free from any taint of duress, imperfect information, or other similar generic problems. The question I address instead is whether

³⁹ Anderson makes this argument (among others) to question the relevance of a worker's decision to accept some workplace risk (rather than quitting and trying to find another job) if another job would be very difficult to find. See ANDERSON, *supra* note 1, at 197. For a more thorough discussion of hard choices, see generally ALAN WERTHEIMER, *COERCION* (1987). My own views are set forth in Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993), and Richard Craswell, *Remedies When Contracts Lack Consent: Autonomy and Institutional Competence*, 33 OSGOOD HALL L.J. 209 (1995).

⁴⁰ This is another version of the second-best problem that arises if the government tries to alter the individual's choice without correcting the underlying problem. See *supra* note 37. Margaret Radin refers to this as the "double bind" problem. Radin, *supra* note 8, at 1910-11, 1921-25; see also Margaret Jane Radin, *Justice and the Market Domain*, in *MARKETS AND JUSTICE* 165, 181-82 (John W. Chapman & J. Roland Pennock eds., 1989). Anderson recognizes this problem in some contexts. See ANDERSON, *supra* note 1, at 155-56 (discussing prostitution). However, no such recognition appears anywhere in her discussion of workplace safety. See *id.* at 197-98.

⁴¹ For analyses emphasizing this solution, see Martha C. Nussbaum, "Whether from Reason or Prejudice": *Taking Money for Bodily Services*, 27 J. LEGAL STUD. (forthcoming 1998) (manuscript at 37-40, on file with author); and Radin, *supra* note 40, at 187-88.

there are any *other* reasons why the government should not justify its decision by the bare fact that the only affected individual would herself make the same choice. In particular, does the literature on incommensurability give us any reason for rejecting this justification for government decisions?

C. *Objections to Subjectivism*

As noted earlier, the argument for following whatever choice the affected individual would make rests on the claim that her choice is entitled to respect, regardless of the reasons for her choice.⁴² This is a subjectivist argument in the sense that it takes the individual's own wishes as morally decisive. To be sure, if someone else must try to *predict* the individual's choices, then nonsubjective elements will necessarily come into play in making that prediction.⁴³ But this argument still aspires to be as subjectivist as possible, both by taking such a prediction as the only justification for a government decision, and by regarding the strength of the justification as turning entirely on the accuracy of the prediction. Obviously, then, one way to attack the justificatory relevance of individual choice functions is to reject the idea that individuals' subjective wishes should control, and to argue that the government should instead pursue some other goal.⁴⁴

Of course, this antisubjectivist move requires some justification (just as the subjectivist position does). One possible argument comes from Amartya Sen, who has emphasized that there is no necessary or logical connection between individual choices and objective well-being.⁴⁵ That is, when utility functions are defined so that they merely report what the individual would choose, there is no logical reason

⁴² See *supra* Part III.A.

⁴³ See *supra* Part II.B.1. A similar point has been made about interpersonal comparisons of utility: As such comparisons require one person to judge or estimate the utility of another, the comparisons cannot be based *solely* on the second person's subjective utility, because the estimator's own judgments will always exert some influence over her estimations. See Donald Davidson, *Judging Interpersonal Interests*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 195, 196 (Jon Elster & Aanund Hylland eds., 1996).

⁴⁴ This argument appears to play a major role in Elizabeth Anderson's rejection of commensurability. See ANDERSON, *supra* note 1, at 58-59; see also Pildes & Anderson, *supra* note 2, at 2193 ("Rational choice should not be understood as a matter of satisfying undefended preferences, but of articulating good and convincing reasons for choices.").

⁴⁵ See Amartya Sen, *Behaviour and the Concept of Preference*, 40 *ECONOMICA* 241, 253-54 (1973); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *PHIL. & PUB. AFF.* 317, 336 (1977).

why the resulting ranking would have to coincide with whatever in fact promotes the individual's well-being (much less why it would coincide with what is best according to any other theory of value).⁴⁶ However, Sen's observation is not itself sufficient to reject the relevance of the individual's own choice unless there is some other basis for government decisions that, as an empirical matter, will *better* coincide with the individual's well-being (or with whatever is best according to some other theory of value). That is, it is always an empirical question whether government officials will come closer to whatever is truly best if they try to make their own assessment of what is best, or if they instead try to predict what the individual herself would choose.

In any event, even if we accept the argument that the individual's own choice should not be controlling, we need an additional argument to get us to the problem of incommensurability. After all, it is perfectly possible to believe both (1) that government decisions should rest on some objective theory of the good; and (2) that the best objective theory permits all options to be ranked along some single metric, such as an overall index of well-being.⁴⁷ In other words, it is possible to reject subjectivism without also rejecting commensurability.

For purposes of this Article, though, the interesting position is one that rejects both subjectivism and commensurability. Antisubjectivism implies that the government should not simply look to whatever the individual herself would choose; and incommensurability implies that the government cannot look to any other single metric. Instead, when the government makes its decision, it will have to face the same problem the individual herself would have faced: the problem of reconciling incommensurable options or values. On this view, then, incommensurability for purposes of the individual's choice will automatically carry over to produce incommensurability for purposes of the government's choice. This combination of incommensurability and antisubjectivism thus offers the most promising avenue of research for future work on incommensurability and the law.

The difficulty this research faces, however, lies in explaining how the government *ought* to decide between options that are truly incommensurable. As noted earlier, most theories of incommensurability do hold that individuals can make rational choices between in-

⁴⁶ This is presumably what Sen meant by the "tautology" statement quoted earlier. See *supra* note 34 and accompanying text.

⁴⁷ For an example of this second position, see Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1056-61 (1989).

commensurable options.⁴⁸ But if these individual choices are not themselves entitled to respect (at least not by virtue of the choice itself), how then should the government decide? It might seem that the government should look to the soundness of the reasons that supported the individual's choice—but what would count as a "sound" reason if the choice was between options that are incommensurable? To answer this question, we need to look more closely at just how individuals can be said to choose between truly incommensurable options. Unfortunately, this is one of the least-developed aspects of modern theories of incommensurability; it is also a point on which different theorists offer different accounts. The following section considers several possibilities.

D. *Alternative Bases for Decisions*

1. Existential and Coherence Theories of Choice

Some theorists, in some situations, believe that an individual facing a choice between incommensurable options must simply choose one or the other by an irreducible act of will. For example, Joseph Raz has argued that "reason cannot advise us how to choose between options which are incommensurate"⁴⁹—either for relatively trivial choices, such as deciding between a walk in the park or staying home with a book, or for much more significant decisions, such as choosing between a career in law or philosophy. To be sure, in either of these cases Raz would not say that the incommensurability of the options makes the resulting choice irrational.⁵⁰ Instead, he believes that either choice would be rational, so it is simply up to the individual to choose.

If we ask what this theory implies for government decisions, though, it seems to push us back toward the subjectivist position in which the government might as well try to figure out what choice the individual herself would have made. That is, if either choice would be perfectly acceptable and it is simply up to the individual to choose, on what basis can the government say that the individual should (objectively) have chosen something else? This theory thus offers no reason to reject the use of the individual's own choice ordering, and no reason to reject the utility functions used by welfare economics.

⁴⁸ See *supra* note 10 and accompanying text.

⁴⁹ RAZ, *supra* note 1, at 345.

⁵⁰ See *id.* at 339.

Less obviously, perhaps, the same may be true of coherence theories of decisionmaking. Some authors have argued that, while there may be no way to rank certain options on a single scale (especially when each of the options would contribute to different values), it is still possible for an individual to decide which option would make the best fit with the overall structure she wishes to give to her life.⁵¹ Henry Richardson has described this deliberative method as a search for "narrative unity."⁵² While this theory might suggest that the options were in fact commensurable, since they could then be ranked in the order of their fit or coherence with the individual's life plan, Richardson views such a ranking more as a way of reporting the *conclusion* of the individual's deliberations, and not as a ranking with any independent existence that could *justify* the individual's conclusion.⁵³

When it comes to government decisionmaking, however, these coherence theories offer no more purchase than did Raz's quasi-existentialist account. As was just noted, coherence theories do not provide any prior, objective perspective from which an individual's choice can be criticized and set aside. Instead, coherence in this sense reflects the result of a deliberative process: the process by which an individual *decides* what shape to give to her life. As Richardson puts it, "this idea of justification looks to no authority other than the deliberating agent."⁵⁴ Thus, on this view too, when the government makes a decision, it has no reason to look to anything other than its best prediction about the choice the individual herself would make.

In short, some theories of incommensurability simply cannot be combined with the kind of antisubjectivism that would justify the government in overriding an individual's choice. That is, whenever a theory of incommensurability denies the possibility that the *individual's* choice of one incommensurable option over another could be justified by any objective criteria, or by any criteria external to the individual herself, that same denial will also make it impossible to justify any *government* decision that would override the individual's choice. Thus, if incommensurability and antisubjectivism are ever to be combined, that combination will have to draw on a rather different theory of incommensurability.

⁵¹ See, e.g., HURLEY, *supra* note 1, at 203-53; RICHARDSON, *supra* note 1, at 152-58.

⁵² RICHARDSON, *supra* note 1, at 151.

⁵³ See *id.* at 179-83.

⁵⁴ *Id.* at 177; see also HURLEY, *supra* note 1, at 262 (describing the search for coherence as "a kind of self-interpretation and self-determination").

2. Constitutive Incommensurability

In contrast to the theories just discussed, some theories of incommensurability do yield definite implications about the proper choice between incommensurable options. One example involves "constitutive incommensurability," or the claim that certain relationships derive their value (or are "constituted") in part by not being treated as commensurable with other goods.

For example, Joseph Raz points out that most people would be offended if they were offered money to sell their children, or even to leave their family for a period of time. On Raz's view, this usually is not a case of the individual ranking her family on the same scale as money, but ranking the money lower. Instead, Raz suggests that many individuals would resist the idea that the two goods (family and money) were even comparable: They would say that it was simply impossible to compare time with their family to any naked cash transfer. Raz's explanation is that—at least for these people—it would change the nature of their family relationships if they were to view time with their family as even potentially exchangeable for cash. And this lets Raz draw an obvious implication for individual decisions: People who wish to enjoy such relationships should not choose to trade them for any amount of money.⁵⁵

As always, the question of interest here is whether these effects *for the individual* of placing family and money on a common scale imply that there is also no common scale that *the government* could use. I think it does not, for two reasons. First, even if the individual in question would not regard time with her family as comparable to any private offer of money, this does not establish that she would regard a government offer as similarly incomparable. Perhaps the government might have a plausible rationale for asking her to leave her family, thereby making it easier for her to justify her choice. Or perhaps the plan would not offer her any role in the decision at all (she would be forcibly relocated with a monetary payment as compensation), thereby relieving her of any guilt for having *chosen* the money over her family.⁵⁶ Indeed, Raz himself notes that an individual who would

⁵⁵ See RAZ, *supra* note 1, at 345-57; see also Warner, *supra* note 2, at 1705; Richard Warner, *Excluding Reasons: Impossible Comparisons and the Law*, 15 OXFORD J. LEGAL STUD. 431, 432 (1995). For somewhat similar views, see ANDERSON, *supra* note 1; Radin, *supra* note 8, at 1908; and *infra* Part III.D.3.

⁵⁶ For a discussion of reasons why the individual's involvement in the choice might make a difference, see Jennifer Gerarda Brown, *The "Sophie's Choice" Paradox and the*

not leave her family for money might still do so for a better career opportunity without necessarily destroying the nature of her relationship.⁵⁷ In other words, the source of the money and the other details of the plan are themselves contextual factors of the sort discussed earlier in this Article.⁵⁸ An individual's response to a private offer of cash therefore cannot necessarily be extrapolated to predict her response to a similar government offer.

In any event, even if individuals reject the idea that time with their family can be valued on the same scale as money from any source, this still does not establish the irrelevance of the individual's own choice function for purposes of the government's decision. An individual who feels this way has an obviously correct choice to make: She should refuse to give up time with her family for any amount of money. (For individuals who do not feel this way because they no longer wish to preserve this kind of relationship, Raz's concern disappears.) And if the individual would choose to stay with her family, there is surely nothing that prevents the government from taking this into account and choosing the option the individual herself would choose. In other words, there is still nothing wrong with the government commensurating the two options according to the individual's own choice ordering and choosing the option that ranks higher.⁵⁹

The key here is that Raz's concern operates only on the individual level, or only on the actual parties to the relationship. That is, even if it is true that the relationship itself would change if *one of the parties* to that relationship began ranking the relationship on the same scale as money, it does not follow that the relationship would change if *an outside observer* (such as the government) began ranking the two goods on the same scale.⁶⁰ Instead, the only way the relationship could

Discontinuous Self: Two Comments on Wertheimer, 74 DENV. U. L. REV. 1255, 1267-68 (1997).

⁵⁷ See RAZ, *supra* note 1, at 348-49.

⁵⁸ See *supra* Part II.B.1.

⁵⁹ See also Warner, *supra* note 2, at 1733 (arguing that the government must "give due weight to the fact that" the individual would not trade the relationship in question for any amount of money, and that it must "take[] such commitments appropriately into account"). Warner does not explicitly say that "due" weight and "appropriate" accounting are satisfied whenever the government makes the same choice that the individual herself would make. However, nothing in his argument is inconsistent with this conclusion.

⁶⁰ For somewhat similar responses to Raz's argument, see Chang, *supra* note 1, at 23-25, and Regan, *supra* note 47, at 1067-71. A rather different critique, which focuses on the interdependency (in a well-functioning family) between the decisionmaker and the other family members, is raised in Epstein, *supra* note 32, at 696-97.

change as a result of outsiders comparing it with money is if there were some further force at work: some psychological spillover, for example, in which the outsiders' ranking somehow affected the parties' own view of their relationship. As noted earlier, these psychological effects would take us beyond the scope of this Article.⁶¹ My only claim here is that Raz's theory about the constitution of individual relationships does not, by itself, imply that there would be anything wrong with the government's ranking of the options according to an individual's utility function.

3. Expressive Theories of Choice

A somewhat similar view has been advanced by Elizabeth Anderson. On Anderson's account, rational action requires that an individual express certain attitudes toward the things that individual values.⁶² Anderson also believes that an individual who regards certain values as commensurable with money would not be expressing the proper attitude toward those values. For example, if parents were allowed to sell their children, Anderson believes that such a sale "would express attitudes toward children that contradict the norms of parental love."⁶³

It would be possible to read Anderson's theory as addressing the choices that individuals ought to make, without any implications for the government. That is, one could believe that parents should not sell their children, for the reasons Anderson gives, while also believing that the state should not override the (misguided) choice of those parents who disagree. This seems to be Raz's position, for Raz does not suggest that the government should prohibit anyone from altering constitutively incommensurable relationships by treating those relationships as commensurable with money.⁶⁴ However, Anderson wants to make the stronger argument: She wants to *prohibit* individuals from selling their children (and also to prohibit the "advance sale" of a child through contracts by a surrogate mother).⁶⁵ In effect, Anderson argues that individuals should not be *allowed* to express cer-

⁶¹ I do, however, consider some of these effects briefly in connection with "commodification." See *infra* Part III.E.

⁶² See ANDERSON, *supra* note 1, at 17.

⁶³ *Id.* at 172.

⁶⁴ See RAZ, *supra* note 1, at 352-53.

⁶⁵ See ANDERSON, *supra* note 1, at 185-86.

tain kinds of improper attitudes, even if the individuals would for some reason choose to do so.

Of course, this argument is hard to defend in the artificial case that I have assumed here, where the choosing individual is the only one who would be affected by that choice. In such a case (admittedly an unrealistic one), it is not even clear that Anderson herself would wish to make the argument I have just attributed to her. For example, many of Anderson's objections to commercial surrogacy rest on what I have called commodification—on concerns about the effect on widely held stereotypes of women.⁶⁶ Anderson also points out that a woman's decision to enter a surrogacy contract can affect more than her own welfare; it could also affect the welfare of the child.⁶⁷ She also believes that some surrogates (many? all?) are induced into their contracts by a form of fraud, or that they are "psychologically coerce[d]."⁶⁸ These concerns with fraud, coercion, or the effects on third parties clearly do not rest on the claim that surrogacy contracts necessarily express an improper moral attitude.⁶⁹

Still, since expressions of an improper attitude are most problematic when others besides the choosing individual would be affected, it will be easier to defer further discussion of this issue to Part IV. Before leaving the topic of surrogacy, however, a brief word about the problem of commodification may be helpful.

E. *Objections to Commodification*

Part of Anderson's objection to commercial surrogacy contracts rests on concerns about commodification. For example, she argues that permitting surrogacy may reinforce negative stereotypes of

⁶⁶ See *id.* at 182-83.

⁶⁷ See *id.* at 172. Anderson does not rest her opposition to surrogacy primarily on its effects on children, though, for she emphasizes that "the focus on narrow welfare consequences to children of contract pregnancy obscures the larger expressive significance of selling infants." *Id.*

⁶⁸ *Id.* at 180-81, 187. On the use of "psychological coercion" in commercial transactions generally, and the difficult normative issues raised by this concept, see Richard Craswell, *The Identification of Unfair Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 139-51.

⁶⁹ Anderson also argues that surrogacy contracts impermissibly restrict the surrogate's physical and emotional autonomy by requiring her to submit to various medical controls over her health, and by discouraging her from forming an emotional attachment to the child. See ANDERSON, *supra* note 1, at 175-79. Space limitations prevent me from discussing these arguments further, but these, too, seem to have little to do with incommensurability as such.

women and promote a destructive patriarchal model of altruism.⁷⁰ I take these to be contingent empirical claims about the actual consequences of commercial surrogacy.⁷¹ As noted earlier, their soundness depends on complicated questions of social psychology that are beyond my competence to evaluate, and hence are beyond the scope of this Article.

It is worth noting, however, that most critics of commodification have been very cautious about predicting when and how commodification is likely to occur. For example, Margaret Jane Radin cautions:

Rather than merely assuming that money is at the core of every transaction in "goods," thereby making commodification inevitable and phasing out the non-commodified version of the "same" thing (or the non-market aspects of sale transactions), we should evaluate the domino theory [i.e., the likely spillover effects on other parties and other transactions] on a case-by-case basis. We should assess how important it is to us that any particular contested thing remain available in a noncommodified form and try to estimate how likely it is that allowing market transactions for those things would engender a domino effect and make the nonmarket version impossible.⁷²

Other authors have been even more cautious, and many are generally skeptical.⁷³

While I cannot directly assess these psychological effects, it is worth considering the connection (if any) between the psychological effects and the normative arguments discussed in this Article. In particular, suppose I am correct as a normative matter: Suppose that an option's ranking on an individual's utility function does provide an acceptable justification for a government decision (at least where only a single individual is affected). Can it still be argued that the government's decision, or its use of a ranking based on the individual's own utility function, is likely to produce undesirable psychological spillovers? That is, if the government announces that "we have cho-

⁷⁰ See *id.* at 182-85.

⁷¹ See Pildes & Sunstein, *supra* note 23, at 69 ("This [commodification] objection is based on an empirical claim that the kinds of valuation reflected in law will affect social valuations in general. Sometimes this is right, but sometimes it is not.").

⁷² Radin, *supra* note 8, at 1914.

⁷³ On the skeptical side, see Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293 (1991), and Eric Mack, *Dominos and the Fear of Commodification*, in *MARKETS AND JUSTICE*, *supra* note 40, at 198. See also MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 23-29, 56-57 (1993); Nussbaum, *supra* note 41 (manuscript at 29-33). The Altman article provides a particularly useful survey of the psychological mechanisms that might either contribute to or help prevent commodification. See Altman, *supra*, at 326-28.

sen option x over all other options, and we have done so for the sole reason that we think the affected individual would herself choose option x ," could such an announcement lead citizens to think that children have no value except as a financial asset, or that women are nothing but reproductive factories, or that a beautiful gorge is no longer something to be viewed with awe?⁷⁴

I will concede that the answer to these questions is "yes," and that the government's use of individuals' utility functions *could* trigger any of these consequences. Human psychology is, after all, a funny business. The undesirable consequences might be especially likely (though still far from certain) if the government bases its predictions on unsound assumptions about the individual's utility functions—for example, if it says that "we think this woman would choose surrogacy *because* we think she views herself as nothing more than a reproductive factory," or "we think the affected individual would choose cheaper electricity *because* we think she is unlikely to care about natural beauty." As noted earlier, welfare economics requires someone to make predictions in order to estimate the content of individuals' choice functions,⁷⁵ and it is easy to imagine those predictions being based on grounds that (if known) could reinforce undesirable stereotypes.

As these examples suggest, however, the undesirable psychological consequences often seem most plausible when the government's metric is normatively unjustified. To take another example, consider that librarians regularly rank works of literature along a single metric (alphabetical order). Booksellers may even keep their accounts in a way that ranks the same works of literature according to a financial metric, such as wholesale cost. But nobody argues that these practices are likely to produce undesirable psychological spillovers, such as causing citizens to believe that literary merit depends solely on the author's rank in the alphabet. Instead, since we can all see the legitimate reasons that librarians might have for choosing an alphabetic ordering (or the reasons that booksellers might have for keeping useful financial records), we resist the conclusion that peoples' attitudes will be undesirably altered by these practices.

⁷⁴ Pildes and Anderson suggest that the government, at least in certain cases, could remain "neutral" and avoid psychological spillovers by announcing an outcome and giving a reason that is independent of the substantive merits of the issue. See Pildes & Anderson, *supra* note 2, at 2167-69. However, they do not consider whether reasons based on an individual's utility function could or should be interpreted in this way.

⁷⁵ See *supra* Part II.B.

I suggest that a similar phenomenon may explain the attribution of undesirable psychological effects to the government's use of welfare economics. If one already believes that welfare economics is normatively wrong—that is, normatively wrong for reasons that would hold even in the absence of psychological spillovers—it may then seem quite natural to assume that the widespread use of welfare economics will produce undesirable psychological spillovers, thus supplying a further reason for objecting to its use. This may be why many critics of welfare economics are quick to assume that it *will* produce undesirable spillovers, even without conclusive psychological evidence.⁷⁶ But if one instead believes that welfare economics is normatively appropriate—appropriate, that is, as long as there are no undesirable psychological spillovers—its use by the government will then seem perfectly defensible, like the librarian's use of the alphabet or the bookseller's use of financial accounts. And while even a defensible practice *could* give rise to undesirable psychological spillovers, such spillovers should not simply be presumed in the absence of psychological evidence.

In any event, my argument in this Article is that the criteria of welfare economics *are* normatively justifiable, at least in the absence of any undesirable psychological spillovers. More precisely, I admit to several possible problems with commensurating options using an individual's own utility functions, but I claim that these are either practical problems of implementation (how can individual choices best be predicted?); problems that have nothing to do with incommensurability (for example, problems involving coercion or imperfect information); or problems that primarily have to do with effects on third parties. Accordingly, it is now time to drop the assumption that only a single individual would be affected, and turn explicitly to third-party effects.

IV. DECISIONS AFFECTING MORE THAN ONE INDIVIDUAL

My analysis so far has been limited to cases where only a single individual would be affected by a government decision. In this Part, I assume instead that the decision affects at least two individuals, and that (whichever option the government chooses) at least one person

⁷⁶ Compare Elizabeth Anderson's criticism (a correct one, in my view) of the consequentialists who are quick to *assume*, without empirical evidence, that the long-run balance of costs and benefits will justify their condemnation of various unpalatable practices. See ANDERSON, *supra* note 1, at 69.

will gain and one person will lose. In such a case, the government cannot justify its decision by pointing to any individual utility function, because each option will rank higher on one individual's function and lower on the other's. Moreover, if the individual utility functions merely report an ordinal ranking of each individual's choices (as I have assumed throughout), the government will also be unable to justify its decision by comparing the gain to one individual against the loss to the other, because a purely ordinal ranking provides no quantitative information about *how much* each individual would gain or lose. In order for the two choices to be commensurable, therefore—commensurable, that is, for purposes of the government's decision—their commensurability will have to be based on something other than ordinal individual utility functions.

A. *Formal Welfare Economics*

Interestingly, at this point many economists embrace the concept of incommensurability and agree that economics can supply no single metric by which gains and losses to different individuals can be ranked. Indeed, it is probably fair to say that the mainstream of welfare economics (at least since the 1930s) has accepted the proposition that there is no meaningful way to make interpersonal comparisons of utility.⁷⁷ On this view, a choice between two options requires a "social welfare function" which states how "society" would rank the various options. Moreover, the mainstream view also holds that this social welfare function must be supplied by some discipline other than economics.⁷⁸

Interestingly, for economists who hold this view, the scope of incommensurability is actually broader than that claimed by many philosophers. If interpersonal comparisons are impossible, then in-

⁷⁷ For an early (and influential) statement of this position, see LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 138-41 (2d ed. 1935). For a useful discussion of the history of economic thought on this point, see generally Robert Cooter & Peter Rappoport, *Were the Ordinalists Wrong About Welfare Economics?*, 22 J. ECON. LITERATURE 507 (1984).

⁷⁸ See Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550 (1939) (describing the choice between Pareto-optimal equilibria as one involving "a political question on which the economist, *qua* economist, could hardly pronounce an opinion"). This is also how the social welfare function is described in microeconomics textbooks. See, e.g., HAL R. VARIAN, MICRO-ECONOMIC ANALYSIS 153 (1978) ("One way to resolve these problems is to hypothesize the existence of some *social welfare function* . . . We will refrain from making philosophical comments here and just postulate that some such function exists . . .").

commensurability is not limited to choices between fundamentally different options, such as a hydroelectric dam and a beautiful mountain gorge. Instead, mainstream welfare economics treats even financial options (including cash!) as incommensurable, as long as they affect different people. Thus, while welfare economics may deny the incommensurability of goods or of values, it has long recognized the incommensurability of people.⁷⁹

To be sure, welfare economics does employ a social welfare function ("SWF") to describe how various options might be ranked.⁸⁰ In formal mathematical analyses, this function assigns a numerical value to each of the possible options. Sometimes this numerical value is even referred to as a measure of "social welfare" or "social utility,"⁸¹ thus implying that every option can still be ranked according to a single metric.

It would be a mistake, however, to assume that the SWF implies that every option is commensurable for purposes of the government's decision. Commensurability, as I have defined it, exists only if there is a single metric that *justifies* the choice of one option over another. But the SWF used in welfare economics is not what justifies the choice of one option, for the SWF simply *describes* a choice that must be justified on some independent ground. That is, while a SWF does presuppose that "society" is somehow able to choose between any two options, thereby making it possible to rank the options in the order in which they would be chosen, the SWF does not presuppose anything at all about what might justify society's choice. In this respect, the SWF is exactly analogous to an individual's utility or choice function, which reports an individual's choice but is not itself what justifies that choice.

⁷⁹ A similar point is made by Epstein, *supra* note 32, at 688. Note that this recognition of the difficulty of interpersonal tradeoffs should itself be enough to refute any charge that economics neglects "the separateness of persons as an important issue in personal and social choice." Nussbaum, *supra* note 2, at 1205. In fairness, Nussbaum may intend this criticism to apply only to Henry Sidgwick and to some of the classical utilitarians (and perhaps also to macroeconomics and developmental economics). In this portion of her article, Nussbaum does not refer to any modern work of welfare economics.

⁸⁰ The social welfare function originated in the work of PAUL A. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 219-30 (enlarged ed. 1983) (originally published in 1947), and Abram Burk (now Bergson), *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q.J. ECON. 310 (1938).

⁸¹ See VARIAN, *supra* note 78, at 153 (describing the SWF as one that "gives us the 'social utility' resulting from any distribution of private utilities").

This point is related to John Harsanyi's demonstration that if the SWF meets certain minimal conditions, it can always be represented as some function of the utility of each affected individual, with different individuals' utilities given different weights.⁸² It might therefore appear that to accept a SWF is to accept the idea that individual utilities can meaningfully be summed, and that government choices can be justified on the basis of the resulting total. As a number of authors have pointed out, however, all that Harsanyi's proof establishes is that any given SWF (or any given ranking of society's choices) can always be *described* or *represented* as a sum of weighted utilities, in the sense that there will always be some sum of weighted utilities that would rank each of the options in the same order as "society" would.⁸³ But Harsanyi's proof does not establish that this ranking is what *justifies* the government's decision. Instead, even on Harsanyi's account, the justification for the decision is supplied by whatever produced the SWF ranking in the first place, for that is the ranking that the sum-of-weighted-utilities function has been chosen to reflect.⁸⁴

In short, mainstream welfare economics does not pretend to offer any theory of how to justify decisions that affect more than one individual, if some individuals would gain while others would lose. Unfortunately, most government decisions *do* affect more than one person (and there almost always is both a winner and a loser). By necessity, then, economists who wish to evaluate most real government decisions have had to go beyond what I am calling mainstream welfare economics by finding some way to compare gains and losses that are felt by different persons. The following section discusses several methods that have enjoyed some use among economists.

B. *The Kaldor-Hicks Criterion (and Its Variants)*

One way to evaluate programs that produce both winners and losers is known as the Kaldor-Hicks (or "potential compensation") cri-

⁸² See John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955). The "minimal conditions" involve such requirements as: If everybody in society ranks two options equally, then the SWF should also rank them equally; or if everybody ranks one option higher than another, then the SWF should also rank that option higher.

⁸³ A useful survey of the literature on this point can be found in John A. Weymark, *A Reconsideration of the Harsanyi-Sen Debate on Utilitarianism*, in INTERPERSONAL COMPARISONS OF WELL-BEING, *supra* note 36, at 255.

⁸⁴ The analogous point about individual utility functions was previously discussed in this Article. See *supra* text accompanying note 11.

terion.⁸⁵ This method involves two steps: (1) Each individual's gain or loss is measured by the maximum amount that individual would choose to pay in order to receive the gain or to avoid the loss; then (2) one option is ranked higher than another if the total amount that the winners would be willing to pay exceeds the total amount that the losers would demand to be paid.⁸⁶ While this method may not yield consistent rankings between *every* pair of options, since some of the rankings it generates could be intransitive,⁸⁷ it will permit many of the options to be ranked in many real-world situations.

There are also many possible variations on the Kaldor-Hicks approach. For example, the maximum that each individual would choose to pay for any option will often depend on that individual's wealth, so the original Kaldor-Hicks criterion could favor options whose benefits are received by the wealthy and whose costs are borne by the poor. To deal with this problem, some economists recommend a weighted version of the Kaldor-Hicks criterion in which the maximum that each individual would choose to pay is multiplied by a factor greater or less than one, with the least wealthy individuals getting the largest multipliers. The most extreme form of such a weighted system is the maximin principle, in which any reduction in the welfare of the worst-off citizens would always outweigh any increase in the welfare of the better-off.⁸⁸ Of course, multipliers could

⁸⁵ See John R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Kaldor, *supra* note 78, at 549-50.

⁸⁶ I abstract here from the question of whether one should compare the amount the losers or winners would have to be *paid* or the amount they would be willing to *pay*. While this distinction can be important for many practical purposes, it is not crucial to any of the issues I discuss here. For a useful discussion of the distinction itself, see Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993). Some possible implications for cost-benefit analysis are discussed in Richard Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169, 1178-84 (1984).

⁸⁷ See T. de Scitovzky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77, 83-87 (1941). For the remainder of this Article, I will set aside those cases in which the Kaldor-Hicks criterion will not yield complete and transitive rankings so that I may focus on the question of whether (or when) the rankings provided by the Kaldor-Hicks criterion can justify government decisions. The problems that arise when the Kaldor-Hicks criterion cannot even provide complete or transitive rankings are discussed in Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998).

⁸⁸ This use of the maximin principle usually is attributed to JOHN RAWLS, *A THEORY OF JUSTICE* 152-57 (1971). Rawls, however, did not recommend that this principle be used to evaluate *any* change in the welfare of the citizens, but only to evaluate a society's basic institutions. See *id.* at 7, 157-58.

also be based on other factors such as intelligence, public service, or even degrees of consanguinity with the royal family. Compared to these variations, the original Kaldor-Hicks criterion represents the special case in which every citizen's willingness to pay is given exactly the same weight.

Other variations simply exclude the amount that individuals would be willing to pay under certain problematic circumstances. For example, one recurring issue concerns the extent to which an individual's willingness to pay for an option should be disregarded if it is based on certain other-regarding preferences (malice, envy, altruism, etc.).⁸⁹ And Richard Posner once endorsed a somewhat idiosyncratic criterion ("wealth maximization") which refused to count the gains received by any party who forced an option on another without the other party's consent, if the circumstances were such that the other party's consent *should* have been obtained.⁹⁰ For example, in evaluating the simple theft of *A*'s goods by *B*, Posner refused to count the amount that *B* *would* have been willing to pay for those goods, because *B* chose not to pay that amount and instead took them without *A*'s consent. But if *B* had been a starving hiker who broke into a remote cabin without *A*'s consent, Posner was willing to count the value of the goods to *B*, because the difficulty of obtaining *A*'s consent was so high that it excused *B*'s behavior.⁹¹

There is, of course, much that could be said for and against each of these variations. For purposes of this Article, however, the important fact is that every one of these variations permits policy options to be ranked according to a single scale. That is, since every one of these variations measures individual gains and losses by how much each individual would be willing to pay, every variation also permits a summing of the various gains and losses to arrive at an overall ranking of the options. Thus, if any one of these variations is accepted as a proper justification for government decisions, that would make the options commensurable as far as the government's decision was concerned.

⁸⁹ See, e.g., Harsanyi, *supra* note 33, at 47; Scanlon, *supra* note 36, at 27-28; Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

⁹⁰ See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 63 (2d ed. 1983).

⁹¹ See *id.* at 65-75. Posner justified his conclusions about when the other party's consent *should* have been obtained on a variety of pragmatic or libertarian or Kantian principles. He could not justify these conclusions on grounds of wealth-maximization, because the conditions under which the other party's consent *should* have been obtained were part of his definition of the end to be maximized ("wealth").

A theorist who wishes to argue against commensurability, then, must argue that there are at least some government decisions that cannot be justified either by the Kaldor-Hicks criterion or by any of its variations.⁹² While there are many objections that might be raised against the Kaldor-Hicks criteria, the remaining parts of this Article consider those objections that are most relevant to theories of incommensurability.

C. *Objections to the Kaldor-Hicks Criteria*

1. Objections to Comparisons Across Individuals

One line of attack challenges the way that the Kaldor-Hicks criteria balance gains and losses to different individuals. For example, it might be argued that the Kaldor-Hicks criteria would permit the interests of the poorest members of society to be sacrificed for those of the wealthiest, if the gains to the latter (as measured by the Kaldor-Hicks criteria) exceed the losses to the former.

This particular criticism, however, can easily be accommodated without abandoning commensurability. As noted earlier, the original Kaldor-Hicks criterion can be modified by assigning different weights to the amounts that different individuals would be willing to pay for some policy.⁹³ By choosing appropriate weights, we can give the choices of the poor as much or as little priority as we like, up to and including a metric in which *only* the choices of poor people are considered (by assigning a zero weight to the choices of everyone else).⁹⁴ And whatever weights are chosen, it will still be possible to sum the amount that every individual is willing to pay (after that amount has been multiplied by the appropriate weight) to construct a metric that ranks each of the possible options along a single dimension.

⁹² For simplicity, I will not keep adding the phrase "and its variants" every time I refer to the Kaldor-Hicks criterion. Except where otherwise specified, when I speak of the "Kaldor-Hicks criteria," I am referring to both the original Kaldor-Hicks criterion and each of the variations discussed above.

⁹³ See *supra* text accompanying note 88. Note that, in this respect, even the Kaldor-Hicks criterion—or, at least, its variations that employ differential weights—cannot be said to neglect the differences between individuals. Cf. *supra* note 79 and accompanying text. It may or may not adopt the best method of accounting for interpersonal differences, but it cannot be said to neglect those differences entirely.

⁹⁴ This is referred to as the maximin principle. See *supra* note 88 and accompanying text.

2. Objections to Subjectivism in Assessing Individual Welfare

Instead, a more interesting line of attack challenges the way that the Kaldor-Hicks criteria adopt each individual's own choices as a measure of that individual's interests. After all, even in the weighted variation described above, the weighting factor is used to multiply *the amount that each individual would be willing to pay* for each of the possible options. But this means that each individual's subjective choices, concerning how much she willingly would pay for each option, will determine how her weight will be "voted" when all the individual interests are summed. For example, if a particular poor person cares nothing about the environment, and would sacrifice a beautiful gorge for even a small amount of money, that person will be treated as assigning a very small value to preserving the gorge. The same is true of individuals who happily would sell their right to vote, or who prefer pushpin to poetry, or who make any other choice that might be unjustifiable from the standpoint of objective theories of value. In short, while the Kaldor-Hicks criteria necessarily take an objective stance in deciding how much weight each individual's interests ought to receive, they are entirely subjectivist in deciding what ought to count as each individual's interest.

As a consequence, the Kaldor-Hicks criteria can be attacked by arguing that government decisions ought to be based on some more objective theory of value: a theory that is not (necessarily) tied to what individuals themselves would choose.⁹⁵ Of course, this rejection of subjective theories of value requires some justification, as discussed earlier in Part III.C (in connection with government actions that affect only a single individual). In cases where more than one individual would be affected, however, the case for respecting the bare fact of an individual's choice arguably is weaker, for this could require some people to give up essential interests to satisfy others' strongly felt but (in some sense) unjustifiable whims. For example, in criticizing choice-based interpretations of the negligence standard in tort law, Gregory Keating has questioned whether average individuals should be required to put their safety at risk just because some drivers have an intense desire to speed on their way to the beach, or because some teenagers get an intense thrill from playing chicken with a rail-

⁹⁵ In welfare economics, this nonsubjectivist approach is often discussed in connection with "merit goods." See Richard Musgrave, *Merit Goods*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 452-53 (John Eatwell et al. eds., 1987).

road train.⁹⁶ When interpersonal tradeoffs are required, it might be argued that the government should make both (1) an objective judgment of the weight to be accorded to different individuals' interests, as is required under all versions of the Kaldor-Hicks criterion, and (2) an objective judgment about the permissible content of each individual's interests.

Indeed, Richard Posner suggested a similar argument when he later expressed reservations about some aspects of his "wealth maximization" criterion. Posner wondered whether a scarce supply of growth hormone should necessarily be allocated to "a wealthy man who wants to put a couple of inches on his normal height and can outbid a poor dwarf who could use the hormone to attain a normal height."⁹⁷ To be sure, this example turns partly on a difference in wealth between the dwarf and the rich man, and this difference could be negated by the use of wealth-related weights. However, a similar problem could arise if the person of normal height was no more wealthy, but simply had an extremely intense desire (even more intense than the dwarf's desire to reach normal height) to be a few inches taller. In essence, problems like these represent different versions of Nozick's "utility monster"⁹⁸—and utility monsters have always posed difficulties for subjectivist theories of interpersonal decision-making.

To be sure, the claim that the government should disregard the individual's own choice is not free from difficulties of its own, even in cases where other individuals would be affected. For example, if it would be justifiable for a swimming enthusiast to drive at forty-five miles per hour to get to the beach to pursue a reasonable desire to swim, would driving at that speed become unjustifiable if she decided she no longer liked swimming, and wanted instead to drive to a field to count blades of grass (which, let us stipulate, is a goal of no objec-

⁹⁶ See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 367-70 (1996). As Keating puts it, "[p]rinciples of mutual freedom differ markedly from those of individual freedom. Individually, we are free to expose ourselves to risks that would be unreasonable to impose on others." *Id.* at 323.

⁹⁷ POSNER, *supra* note 90, at v.

⁹⁸ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 41 (1974). Nozick's utility monster was objectionable because his utility was much greater than everyone else's, so his preferences (in effect) received too much weight when all the utilities were summed. But even if everyone's preferences receive the same weight, a similar problem arises if the *content* of an individual's preferences is "monstrous," and if these monstrous preferences are treated on the same footing as everyone else's more legitimate concerns. I am grateful to Gregory Keating for helping me understand this distinction.

tive value)? Similarly, if we decide that it would be justifiable for the government to give everyone in society \$500 for preventive health care, must we overrule any individual who would rather live a slightly less healthy life in order to spend the money on books about art?⁹⁹ What if she instead wants to spend it on mystery novels, or on pornographic videos? Obviously there are serious difficulties (both conceptual and practical) in asking the government to make objective judgments about tradeoffs such as these, while still giving adequate scope to different individuals' conceptions of the good.

In any event, if the government is to base its choices on some nonsubjectivist theory of value, this raises the question of what theory of value it ought to use. The following section considers several possibilities, concentrating on those that might fit with theories of incommensurability.

D. *Alternative Bases for Decisions*

1. Lexical Orderings

One alternative to the Kaldor-Hicks criteria would assign a lexical priority to certain goods. That is, it might be possible to identify a set of essential goods, perhaps along the lines of Rawls's basic liberties,¹⁰⁰ that could never justifiably be sacrificed to achieve more of some other kind of good. For example, it might be thought that it is *never* legitimate to sacrifice environmental values (or political freedoms) to obtain more economic growth. Indeed, this sort of claim is popularly associated with the idea of incommensurability, though—for the reasons discussed below—this is not what most incommensurabilists actually believe.

The principal problem with a lexical ranking of goods is that it is usually implausible on its merits. That is, there are few if any goods whose priority is truly lexical on the social level, in the sense that they could never be sacrificed for *any* amount of savings in any other good.¹⁰¹ Perhaps life itself might be such a good, in the sense that it

⁹⁹ This example is suggested by GRIFFIN, *supra* note 35, at 45.

¹⁰⁰ See RAWLS, *supra* note 88, at 60-61; JOHN RAWLS, *The Basic Liberties and Their Priority*, in POLITICAL LIBERALISM 289 (1993).

¹⁰¹ The most plausible exceptions involve political theories that treat individual rights as absolute trumps, which cannot be set aside for any instrumental values. These theories can be read as asserting a lexical ordering between rights and certain instrumental values, or even as asserting a kind of incommensurability (between rights and whatever instrumental values are excluded). See, e.g., RONALD DWORKIN, TAKING

might never be legitimate to take someone's life with absolute certainty in order to achieve purely financial savings (though even this would be debatable if the financial gains were large enough, and if the uses to which those gains might be put were sufficiently noble). In any event, no such lexical ban can be placed on conduct that merely *risks* the loss of life, for we regularly accept greater or lesser risks of death. And since very few policy options require anyone to lose her life with absolute certainty, a principle that includes (at most) cases of certain death is not very useful.

Indeed, few if any theorists endorse a truly lexical ordering, in the sense that they would never accept *any* reduction in the favored goods in order to get more of some other good. For example, while John Rawls assigns some priority to basic liberties by ranking them ahead of economic goods in most situations, he allows them to be reduced if doing so would be necessary to raise a society out of extreme economic hardship.¹⁰² Elizabeth Anderson, too, is quite explicit that her views about incommensurability do not preclude her from sacrificing certain goods (for example, environmental values) in order to obtain other economic benefits.¹⁰³ The same is true of the constitutive incommensurabilities discussed earlier in Part III.D.2, where it was claimed that it would be inconsistent with a certain kind of relationship even to consider exchanging that relationship for money. Since most who hold this view do not believe that it is mandatory for an individual to enter (or maintain) any particular kind of relationship, they can freely concede that the individual would be justified in abandoning the relationship if the cost of maintaining it became too high (thus sacrificing the quality of the relationship in order to obtain other, nonrelationship benefits).¹⁰⁴

2. Other Objective Orderings

Instead, most incommensurabilists argue that while certain tradeoffs or sacrifices are indeed justifiable, the justifications for those tradeoffs cannot be captured by the Kaldor-Hicks criterion, or by any

RIGHTS SERIOUSLY at xi (1977); NOZICK, *supra* note 98, at 29-33. But this question is already the subject of a vast literature, and I see nothing to be gained by viewing it through the lens of incommensurability.

¹⁰² See RAWLS, *supra* note 88, at 541-43. (To a similar effect, see NOZICK, *supra* note 98, at 30.) The priority of basic liberties is qualified in additional ways in RAWLS, *supra* note 100.

¹⁰³ See ANDERSON, *supra* note 1, at 59-64, 66-67, 230 n.6.

¹⁰⁴ For an explicit discussion of this point, see Warner, *supra* note 2, at 1728-29.

other criterion that tries to reduce all of the relevant considerations to a single metric. This, of course, is the incommensurability argument defined in Part I: No reduction to a single metric can yield a ranking that is capable of *justifying* the government's decision.

To be sure, even if one rejects the Kaldor-Hicks criterion as an acceptable justification, there might be other single metrics that could take its place. For example, it might be possible to define well-being in terms of some objective list of the actual goods and services available to each individual—though this would require someone to decide which goods and services are objectively most important.¹⁰⁵ Objective well-being might also be defined in terms of the development of personal capabilities, as suggested by Amartya Sen¹⁰⁶—though this requires a similar sort of judgment about which capabilities are most important. In either case, it might also be possible to construct an overall *index* of objective well-being, allowing the government to rank options according to this single metric. To the extent that critics of the Kaldor-Hicks criteria prefer such an index, they are not really denying commensurability itself, but are merely objecting to one particular class of metrics (metrics based on subjective intensities of preference). As noted earlier, it is possible to reject subjectivism without also rejecting commensurability.¹⁰⁷

As before, though, the issues of interest here are the ones that arise if commensurability, too, is rejected, so that it is impossible to construct a single index of objective well-being (or of any other relevant moral goal). However, this combination still leaves us with the problem of deciding how government decisions *ought* to be justified in cases where objective commensurability is lacking (and subjectivist criteria are rejected). Unfortunately, we have now reached the least developed part of the fledgling literature on incommensurability and

¹⁰⁵ Cooter & Rappoport, *supra* note 77, at 512-20, suggest that this was the position of many economists prior to the emergence of modern welfare economics.

¹⁰⁶ See AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 59-71 & app. A (1985). The focus on capabilities, rather than on specific goods, provides at least a partial response to the difficulty discussed earlier in the text. See *supra* note 99 and accompanying text. For further discussions of this approach, see *QUALITY OF LIFE* (Martha Nussbaum & Amartya Sen eds., 1983).

¹⁰⁷ See *supra* text accompanying note 47; see also Keating, *supra* note 96, at 327 ("Since conceptions of the good are diverse and incommensurable, objective valuation is the *best* solution to problems of *interpersonal* choice."). While this passage describes diverse goods as "incommensurable," it is clear that Keating means only that their value cannot be measured quantitatively in dollars. On Keating's view, diverse goods can still be *compared*, and one or the other can still be ranked on an objective scale. See *id.* at 362.

the law. In the remaining portions of this section, I consider and reject two alternative theories of justification that have been developed in that literature. One theory holds that government decisions must be justified procedurally, by whatever choice emerges from public deliberation or from other democratic institutions. The other holds that government decisions must be justified by whether they express the appropriate moral attitudes. For the reasons I discuss, neither of these positions is persuasive—which suggests that the implications of incommensurability on the law are still to be discovered.¹⁰⁸

3. Deliberative Justifications

Rather than trying to justify an objective set of tradeoffs involving particular goods or capabilities, we might look for a procedural justification for government decisions. For example, it might be argued that, when incommensurable values are at stake, government choices should be based on whatever choices emerge from rational public deliberation, or from some other democratic process. As Richard Pildes and Elizabeth Anderson have expressed it:

Political institutions and decision procedures must create the conditions out of which, for the first time, a political community can forge for itself a collective will. Those institutions and procedures specify whose views will be counted in determining the collective will and define the means by which the collective will can be recognized.¹⁰⁹

I have no quarrel with the general proposition that public deliberation and democratic institutions are good procedures for making government decisions. As a response to the problem of incommensurability, however, this argument simply pushes the problem back to an earlier stage. That is, if all we can say about government decisions is that they are justified whenever they emerge from public deliberation and a democratic vote, we still have a question about what the participants in that deliberation ought to be deliberating *about*. For example, if I am a public-spirited voter, I will look to political theory

¹⁰⁸ As Richard Warner has concluded, “[m]y point is not that this problem is unsolvable. My point is that there is a problem to be solved.” Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147, 170 (1992).

¹⁰⁹ Pildes & Anderson, *supra* note 2, at 2198 (footnotes omitted); see also *id.* at 2179 (“[R]ational political preferences can be achieved in the face of plural demands and perspectives only within institutional settings that create time-, place-, and manner-like constraints on the expression of types of political preferences. Only preferences that have been mediated by these institutional settings will be respected by other legislators . . .”).

to tell me which proposals to support, and which kinds of arguments to consider in my deliberations. (If I am instead a selfish voter, I might consider only arguments relevant to my own self-interest—but this clearly is not the sort of deliberation that Pildes and Anderson have in mind.) And if all that political theory can tell me is that I should support whatever proposal emerges as a result of the democratic process, I am left with no guidance whatsoever at the deliberation stage.

To put the point more concretely, nothing in the argument so far provides any reason why it would be wrong for public-spirited voters to always vote for whichever option ranks highest according to one of the Kaldor-Hicks criteria, or according to any of the other commensurabilist criteria discussed above. Nor has anything yet been said to show why the deliberation itself should not take the Kaldor-Hicks criteria as its central focus, with citizens debating which option truly ranks higher in Kaldor-Hicks terms. Thus, before we can reject the normative relevance of the Kaldor-Hicks criteria (or of any other single metric), we need an argument that public-spirited voters ought *not* to choose the option that ranks highest in Kaldor-Hicks terms, and ought instead to deliberate about which option is best justified according to some other criterion. This, in turn, requires some substantive normative argument to explain why the other criterion is normatively superior to the Kaldor-Hicks criteria. But such a substantive argument must come from some other source; it cannot come from the bare principle of public deliberation.

4. Expressive Justifications

As it is impossible to survey the entire field of normative criteria that might be thought substantively superior to Kaldor-Hicks—and since many of these have nothing to do with incommensurability—I will conclude by discussing a related argument of Elizabeth Anderson's, that governments should choose options that express the proper evaluative attitude. As noted earlier, Anderson believes that individual choices should express proper attitudes toward the objects of choice, and that selecting the proper attitude may require the reconciliation of several diverse kinds of valuations (thus producing incommensurability for purposes of the *individual's* decision).¹¹⁰ If the government is, for these purposes, just like an individual, in the sense

¹¹⁰ See ANDERSON, *supra* note 1, at 17-43; see also *supra* Part III.D.3.

that it too should make choices that express the proper attitudes, incommensurability for an individual decision would automatically translate into incommensurability for the government.

However, some argument is needed to explain why the government ought to be treated like an individual, in the sense of requiring its choices to express proper attitudes. When discussing individual action, Anderson derives this requirement from the demands of self-understanding,¹¹¹ and it is hardly obvious that self-understanding should be demanded of governments. To the contrary, by most liberal accounts the government is an inanimate institution, which is justified (if at all) by what it contributes to its individual citizens.

In any event, even if we accept the premise that government decisions ought to express appropriate attitudes, there is still the problem of determining which decisions express which attitudes in order to determine which decisions are ruled out by this premise. Pildes and Anderson take the Ford Pinto case as a possible example, offering the following reason for the public outrage over Ford's cost-benefit analysis: "[G]iven the background of social and legal understandings against which Ford executives had acted, Ford's particular tradeoff *expressed contempt* for human life. Other tradeoffs of safety against cost need not do so."¹¹²

Pildes and Anderson thus do not claim that social and legal understandings assign the same contempt to every use of cost-benefit analysis, or to every analysis that balances safety against financial costs. But they also do not offer any basis for distinguishing those cost-benefit analyses that express contempt from those that do not. They do suggest that part of the outrage in the Ford case was due not to the cost-benefit analysis itself, but rather to the fact that Ford (having decided to build the Pinto in a certain way) did not disclose the resulting risks to consumers.¹¹³ But Ford's nondisclosure of the risks presumably would have been problematic even if it had never used a cost-benefit analysis at all—for example, if it had used some other, morally acceptable basis for deciding what level of risks to build into the car,

¹¹¹ See ANDERSON, *supra* note 1, at 17 ("To fully make sense of one's rational concerns, one must be motivated to actually establish the relationship to the object of one's concern which is implicit in one's attitudes toward it.").

¹¹² Pildes & Anderson, *supra* note 2, at 2151.

¹¹³ See *id.* (characterizing Ford's nondisclosure as "heightening" the contempt expressed by the cost-benefit analysis).

but had still refused to disclose whatever risks remained.¹¹⁴ We are therefore left with the question of what it is about the cost-benefit analysis itself (as distinct from the nondisclosure) that gives rise to Pildes and Anderson's interpretation of it as expressing contempt for human lives.

Pildes and Anderson may believe that the appropriate interpretation can be drawn, on a case by case basis, by examination of our "background of social and legal understandings."¹¹⁵ In a similar way, other legal scholars sometimes seem to assume that "social meanings" are a semiotic sign or code, which—though the proper decoding may vary from group to group or context to context—can still supply a determinate meaning in any particular context.¹¹⁶ But this is at best a controversial view of how meanings work, and one that many linguists and philosophers of language would dispute.¹¹⁷ An alternative view—though this, too, is controversial¹¹⁸—is that the meaning of most social actions, unlike the meanings established by a predefined code, must be imputed or constructed by a more creative act on the part of the interpreter, in which the interpreter's own normative beliefs will inevitably play an important role. That is, if we already believe that cost-benefit analysis is unjustified on other grounds, it may then make perfect sense to interpret the cost-benefit analysis as expressing an improper attitude. But if we instead believe that the cost-benefit analysis is justified, we will then have no reason to interpret it as expressing anything improper. On this view, then, imputing a "meaning" to an action does not really supply an independent reason for criticizing that action, but rather restates a normative conclusion that must be defended on other grounds.¹¹⁹

¹¹⁴ Pildes and Anderson clearly do not believe that Ford should have built the car leaving no risks at all. *See id.*

¹¹⁵ *Id.*

¹¹⁶ *See, e.g.,* Lessig, *supra* note 22, at 973-74. Lessig quotes Pierre Bourdieu: "[C]ulture . . . is a common code enabling all those possessing that code to attach the same meaning to the same words, the same types of behavior and the same works . . ." *Id.* (quoting Pierre Bourdieu, *Systems of Education and Systems of Thought*, in READINGS IN THE THEORY OF EDUCATIONAL SYSTEMS 159, 162 (Earl Hopper ed., 1971)).

¹¹⁷ For criticisms of the code model, see DAN SPERBER & DEIRDRE WILSON, RELEVANCE: COMMUNICATION AND COGNITION 1-64 (2d ed. 1995).

¹¹⁸ For citations to the literature on linguistics and the philosophy of language, see Richard Craswell, *Do Trade Customs Exist?*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW (Jody Kraus & Steven Walt eds., forthcoming 1998) (manuscript at 18-26, on file with author).

¹¹⁹ See the analogous argument regarding commodification discussed *supra* Part III.E.

In any event, even if an existing social or legal background does require us to interpret certain uses of cost-benefit analysis as expressing contempt, it is not clear why that existing background should be taken as given. In other contexts, Anderson recognizes that we are not limited to whatever set of norms happens to exist in any particular society, and that we can criticize existing norms and urge their replacement with new ones.¹²⁰ Thus, even if she and Pildes are correct in identifying the social understanding at work in the Pinto case, it hardly follows that the government must simply accept that understanding, rather than arguing for a new interpretive convention. If their belief is that the existing convention is proper, and that (some) cost-benefit analysis *ought* to be interpreted as expressing contempt for human life, then we are back to an independent normative conclusion that must be justified on some other ground. And if their concern is simply that the government might not be successful in changing the convention, so many people would continue to interpret the government's cost-benefit analysis as expressing contempt, then we are back to predictions about the psychological consequences of government decisions (in other words, we are back to commodification). These psychological predictions—though undoubtedly important—are simply beyond the scope of this Article.

CONCLUSION

I began by asking what implications the incommensurability thesis would have (if it were true) for the justification of legal decisions. Unfortunately, this question is impossible to answer without some theory of how government decisions ought usually to be justified. That is, depending on what one believes about how government decisions should usually be justified, the effect of incommensurability could range from nothing to quite a lot.

In particular, incommensurability will have no effect at all on those who hold a subjectivist theory of individual welfare, by which I mean any theory that assesses individual welfare by reference to the choices that would have been made by the individuals themselves. Since the incommensurability thesis (in most of its forms) does not hold that individuals themselves cannot make choices between incommensurable goods, a subjectivist can simply take those choices and use them as the basis for her conclusions about the individuals'

¹²⁰ See ANDERSON, *supra* note 1, at 25. For a similar argument, see Sunstein, *supra* note 2, at 792.

welfare. There are, of course, other problems with a purely subjectivist approach—for example, the need to define the conditions under which an individual's choice should be respected (what forms of coercion or imperfect information should be excluded?); the difficulty of predicting the choice an individual would have made under those conditions; and the difficulty of reconciling gains to one individual with losses to another. But these are all well-known difficulties with subjective welfarist theories, and neither the difficulties nor their possible resolutions are altered by the presence of incommensurability.

On the other hand, if government decisions must be justified by something other than the choices of the affected individuals, the incommensurability thesis could (if true) have significant implications. That is, if the government should base its decision on some nonsubjectivist criterion, but if our best understanding of the relevant criterion sees certain goods or values as incommensurable, we will not be able to justify the government's decision unless we have some way of justifying choices between incommensurable options. Unfortunately, most of the philosophical writing on this issue has focused on how to justify an *individual's* choice between incommensurable options, and thus has not addressed the problem of justifying a government's choice. In this Article, I considered some possible theories for government decisions—for example, that certain goods ought to receive lexical priority, or that the government should make choices that express appropriate moral attitudes, or that it should simply follow whichever choice emerges from public deliberation. As each of these theories seems to me to be flawed, I conclude that the literature on incommensurability has yet to tell us how government decisions ought to be altered.